PREME COURT, U. S.

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No. 848

In the

Supreme Court of the United States

OCTOBER TERM 1968

HAL HALL AND SNOW BLACKBURN HALL,
Petitioners,

v.

PAUL J. BLEISCH AND LIANA BLEISCH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Said Honorable Court:

Petitioners Hal and Snow Blackburn Hall, Appellants in the proceeding below, pray that a writ of certiorari issue to review the Judgment herein of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The per curiam memorandum opinion of the Court of Appeals was handed down September 30, 1968, and is set out as Appendix A hereto, with the judgment of that Court as Appendix B.

JURISDICTION

The Judgment of the Court of Appeals was entered September 30, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a final state court judgment entered prior to the filing of this action in federal court, concerning the same automobile accident, the same subject matter, the same law and facts, and the same adversary parties is res judicata of the present action.

2. Whether the United States District Court for the Western District of Texas and United States Court of Appeals for the Fifth Circuit failed to give full faith and credit to the state court judgment as required by 28 U.S.C., §1738, and such failure amounted to a denial of due process.

3. Whether the Texas prohibition against splitting a cause of action and the compulsory counterclaim rule, and the policies behind such rules, bar the present action by Respondents.

STATUTES AND RULES INVOLVED

1. 28 U.S.C., §1738, insofar as material here, provides as follows, concerning "the records and judicial proceedings of any court" of "any State, Territory or Possession of the United States":

> "Such Acts, records and judicial proceedings or copies thereof, as authenticated, shall have the full faith and

> credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

2. Rule 97(a), Texas Rules of Civil Procedure, provides as follows:

> "A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of a transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third persons of whom the court cannot acquire jurisdiction. * * *"

3. The Fifth Amendment to the Constitution of the United States, insofar as material here, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *"

STATEMENT OF THE CASE

On July 9, 1965, a three-car accident occurred in Iraan, Texas, at the intersection of Texas Highway 29 and Texas Highway 349. Mr. and Mrs. Paul Bleisch were in a Volkswagen which collided with an Oldsmobile driven by Mrs. Hall; after this collision, the Volkswagen struck a parked Buick owned by J. E. Coles (Coles' Petition, State Court Proceeding, R. 20-27; Plaintiffs' Federal Court Amended Complaint, R. 39-52; Defendants' Motion for Dismissal, Federal Court, R. 6-10). As a result of the accident, J. E. Coles sustained property damage to his Buick (R. 20-27),

and Mr. and Mrs. Bleisch sustained personal injuries and property damages (R. 39-52).

On May 19, 1966, Coles brought suit in the District Court for Pecos County, Texas, 112th Judicial District, naming as defendants H. H. Hall and wife, Snow Blackburn Hall, and Paul Joseph Bleisch and wife, Liana Bleisch. The petition described the accident occurring on or about July 9, 1965, in Iraan, Texas, at the intersection of Highway 29 and 349, and sought damages jointly and severally from all defendants because of the actionable negligence of the two drivers, Mrs. Hall and Mrs. Bleisch (R. 20-28). Coles obtained personal service upon Mr. and Mrs. Bleisch in California (R. 28-30), and appearances were subsequently made on behalf of Mr. and Mrs. Bleisch and on behalf of Mr. and Mrs. Hall in the state court action (R. 31-34; 35-38).

The pleadings filed for Mr. Hall and his wife in the state court suit included a cross-action against Mr. and Mrs. Bleisch, alleging negligence of Mrs. Bleisch as a proximate cause of the accident (R. 32-34). A cross-action was filed by Mr. and Mrs. Bleisch against the Halls, making this express allegation:

> "* * * If plaintiff should recover anything against these defendants, then let it have judgment for indemnity over and against defendants H. H. Hall and wife, Snow Blackburn Hall; in the alternative, in the event that judgment be rendered against these defendants on plaintiff's cause of action, then these defendants pray that they have judgment for contribution from the defendants H. H. Hall and wife, Snow Blackburn Hall. * * *" (R. 37.)

An agreement was made by all parties concerning disposition of the state court action and all matters which were or might have been asserted therein; this agreement was embodied in a final judgment entered by the 112th Judicial District Court of Pecos County, Texas, on February 25, 1967, (R. 10-13). The judgment included the following language:

> "It is further Ordered, Adjudged and Decreed by the Court that:
>
> > "(1) That the defendants H. H. Hall and wife, Snow Blackburn Hall; * * * go hence, free and clear of all claims, demands, and causes of action, which have been or which might have been asserted against them in this suit by J. E. Coles, dba Coles Chevrolet Company, or any other person, firm or corporation.
> >
> > "(2) * * *
> >
> > "(3) That Paul J. Bleisch and wife, Liana Bleisch, recover nothing on their cross-action for indemnity of and from the cross-defendants H. H. Hall and wife, Snow Blackburn Hall."

The state court judgment was not appealed and became final; similarly, no action to modify, correct, amend, or change the state court judgment in any respect has ever been instituted (R. 8-9).

On March 3, 1967, five days after the entry of the state court judgment, this action was filed in the United States District Court for the Western District of Texas by Paul J. Bleisch and Liana Bleisch against Hal Hall and his wife, Mrs. Snow Hall (R. 1-4), seeking damages for personal injuries allegedly sustained in the accident of July 9, 1965,

in Iraan, Texas, at the intersection of Highway 29 and Highway 349 (R. 1-2). Jurisdiction in federal court was founded upon diversity of citizenship. After service of summons in the federal court action on March 21, 1967 (24 days after the entry of the state court judgment), defendants moved for dismissal under Rule 12(b) (6), Federal Rules of Civil Procedure, on the grounds of the legal effect of the prior state court proceedings between these same parties (R. 6-13). In the motion the final state court judgment was expressly recited, and a certified copy of the judgment was attached and incorporated therein.

In response to defendants' motion for dismissal, Respondents filed three affidavits (R. 13-20), the substance of which was that while both Mr. and Mrs. Bleisch knew of the pendency of the state court action and acknowledged retention of the attorney defending them in this action through their insurance carrier, and that while their personal attorney, Frank Butters, knew judgment was to be entered in the state court prior to its actual entry (R. 19-20), still neither Mr. nor Mrs. Bleisch was personally aware of the exact terms of disposition of the state court suit.

At the hearing on the motion for dismissal, certified copies of all pleadings in the state court action were presented and considered by the Court (R. 60-62); the Court overruled the motion without noting the reasons for this action (R. 39). Petitioners excepted to the overruling of their motion for dismissal, "which exception was in all things allowed" (R. 60-62). Petitioners thereafter answered in the case, asserting once more that this action was wholly and completely barred by the earlier state court proceedings

between the parties (R. 54). The Court directed that the case proceed to trial, and after a verdict of $14,575.00 was returned, judgment was so entered for Respondents (R. 57-58) despite Petitioners' motion with respect thereto, which again raised the prior state court proceedings as a bar to entry of such a judgment (R. 58-62).

Appeal was duly perfected to the United States Court of Appeals for the Fifth Circuit, which affirmed by a short per curiam opinion.

REASONS FOR GRANTING THE WRIT

I.

The United States District Court and Court of Appeals failed to give full faith and credit to the prior state court judgment which is res judicata of the claims sought to be asserted by Respondents herein, and the allowance of a recovery against Petitioners in the face of that judgment is a violation of due process.

While the full faith and credit clause of the United States Constitution refers to the effect to be given "in each State to the * * * judicial proceedings of every other State," 28 U.S.C., § 1738, is broader in that it requires full faith and credit to be given the valid judgments of any court of any State "in other courts within the United States and its Territories and Possessions." It is well settled that under the statute federal courts are included among those that must extend full faith and credit to state judgments. *Huron Holding Corp. v. Lincoln Mine Operating Co.*, 312 U.S. 183,

85 L. Ed. 725; *Davis v. Davis*, 305 U.S. 32, 83 L. Ed. 26, etc. Certainly a federal court in the same state should give full faith and credit to a valid state court judgment.

The doctrine of full faith and credit supports and gives effect to the doctrine of res judicata. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 88 L. Ed. 149, *U. S. v. Silliman*, 167 F. 2d 607, cert. den., 355 U.S. 825, 93 L. Ed. 379; Cheatham, Res Judicata and the Full Faith and Credit Clause, 40 Col. L. Rev. 330; Vestal, The Constitution and Preclusion/Res Judicata, 62 Mich. L. Rev. 33. Thus, as stated by this Honorable Court in *Riley v. New York Trust Co.*, 315 U.S. 343, 89 L. Ed. 885, "the local doctrines of res judicata, speaking generally, become a part of national jurisprudence."

Likewise, since federal jurisdiction herein was based on diversity of citizenship, the state law of Texas is determinative under the *Erie* doctrine. *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 89 L. Ed. 2079. In particular, state law applies to questions of res judicata in diversity cases. *McConnell v. Travelers Ind. Co.*, 346 F. 2d 219 (C.A. 5th, 1965); *Forrester v. Southern* Ry., 268 F.S. 194 (N.D. Ga. 1967).

The Courts below have failed to give the state court judgment here its clear effect under the laws of the State of Texas, and thus have denied it full faith and credit.

The Supreme Court of Texas in *Ogletree v. Crates*, 363 S.W. 2d 431 (1963), declares:

> "The rule of res judicata in Texas bars litigation of all issues connnected with a cause of action or defense

> which, with the use of diligence, might have been tried in a former trial, as well as those which were actually tried."

The per curiam opinion of the Court of Appeals misses the point that in the state court proceeding here the Bleisches did assert a cause of action against the Halls and thus were not merely co-defendants with the Halls but were in the position of plaintiffs asserting a cause of action against them. Thus, the question is really not whether the Bleisches were required to assert a cross-action against their co-defendants, but rather whether, having asserted a cross-action, they were required to include within it all of the claims they had against the Halls growing out of this accident, rather than merely part of them. Thus, the language and rule of the *Ogletree* case directly applies, contrary to the view of the Court of Appeals. This is made clear by the Texas case of *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W. 2d 367, er. ref. n.r.e., discussed below.

The Court of Appeals errs in assuming that co-parties cannot also be opposing parties. Of course, co-defendants as such are co-parties, but they can also be opposing parties and will be if either asserts an action or claim against the other. This is clearly pointed out in 1b Moore's Federal Practice, 2nd Edition, Sec. 0.411[2]:

> "As a general proposition, the requirements of identity of parties and mutuality are not satisfied, and persons who were co-parties to a prior suit are not concluded, in subsequent litigation between themselves, by the judgment rendered in the suit in which they were co-parties, *unless they occupied positions adverse to one another in the suit to which they were co-parties.* * * *

> If a claim for relief was asserted by one co-party against the other, litigated between them and adjudicated by the judgment in the suit to which they were co-parties, then the co-parties were clearly adversaries, the judgment is res judicata between them and all issues adjudicated by the judgment between them are concluded under the doctrine of collateral estoppel."

Here the Halls and Bleisches did assert claims for relief against each other in the state court action. Therefore, they were opposing parties as well as co-parties, and the judgment in the first action is res judicata between them.

The state court judgment clearly adjudicates more than the damage claim of Coles. The first operative paragraph disposes of that claim by dismissing it with prejudice, and no further provisions in the judgment were needed as to it. If disposition of the Coles' claim had been the only consideration of the state court and the parties when the judgment was entered, no further judgment provisions would have been needed or included. However, the judgment does not stop with the dismissal with prejudice of the action by Coles but expressly goes on to order, adjudge and decree that "the Defendants, H. H. Hall and wife, Snow Blackburn Hall * * * go hence, free and clear of *all claims, demands, and causes of action, which have been or which might have been asserted against them in this suit by* J. E. Coles, d/b/a Coles Chevrolet Company, or *any other person, firm or corporation.*"

Such language might not bind any other person, firm or corporation which was not a party to the case or privy to a party, but Mr. and Mrs. Bleisch were parties and are

bound by this part of the judgment as well as receiving benefits from the judgment, which likewise releases them. This paragraph was intended to put an end to litigation between all of the parties to the state court action with respect to this automobile accident, and the plain language of the judgment so provides.

The state court judgment likewise specifically provides that Mr. and Mrs. Bleisch recover nothing on their cross-action against the Halls, and vice versa.

The validity of the state court judgment has not been attacked nor has the jurisdiction of the state court. The adversary parties here appeared as adversary parties in the state court case and presented actions against each other as well as defending against the action of Coles. The fact the state court judgment was an agreed judgment does not detract from its effect as res judicata in a subsequent suit, and an agreed judgment under Texas law is as conclusive as a judgment rendered after contest. Thus, *Rhodes v. Prudential Leasing Corp.*, 413 S.W. 2d 404 (1967), declares:

> "These undisputed facts evoke the rule that a judgment of dismissal entered by agreement of the parties in pursuance of a compromise, or settlement of a controversy, becomes a judgment on the merits. See Stephenson v. Gaines, 298 S.W. 401 (Tex. Comm. App., 1927);—Van Cleave v. Bell Oil & Gas Co., 102 S.W. 2d 1103 (Tex. Civ. App. — Ft. Worth, 1937, err. dism.). That such judgment is conclusive, not only on the matters actually raised and litigated but also is conclusive on every other matter which the parties might have litigated and had decided as an incident to or

> essentially connected with the subject matter of the litigation. *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W. 2d 216 (1942)."

Other Texas cases making clear the res judicata effect of an agreed judgment include *Burnaman v. Heaton*, 240 S.W. 2d 288, (Sup. Ct.); *State v. Reagan County Purchasing Co.*, 186 S.W. 2d 128, er. ref. w.o.m. etc. This is likewise recognized by the federal cases. *Standard Oil Co. v. Clark*, 163 F. 2d 917; *Pick Mfg. Co. v. Gen. Motors Corp.*, 80 F. 2d 639; *U. S. v. R.C.A.*, 46 F.S. 654, app. dism. 318 U.S. 796, 87 L. Ed. 1161; *Economy Food & Liquor Co. v. Transport Distillers Corp.*, 232 F. 2d 410; etc.

The res judicata effect of a state court judgment is to be recognized in federal court. *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F. 2d 960; *Brewster v. Kable News Co.*, 148 F. 2d 610, etc.

The state court judgment of February 25, 1967, is a valid final judgment in a case dealing with the three-car accident of July 9, 1965, and in which the present parties were asserting causes of action against each other arising out of that accident, as well as opposing the claim of Coles. Certainly the claims later asserted by the Bleisches in federal court might have been asserted in the state court proceedings along with the indemnity claim they did assert. Since the Bleisches and the Halls were litigating against each other in the state court action in connection with this accident, the state court judgment is a bar not only as to the claims they actually brought against each other in that action but also those which they "might have litigated"

in connection with the same subject matter, the accident of July 9, 1965.

The scanty opinion of the Court of Appeals cites no prior cases in support of its position, and there are none. It states that the "issue" presented in the federal suit was not an issue in the state court litigation nor such an issue as to require the application of res judicata, but in fact the issue in the federal action was very much in issue in the state court proceedings. Respondents as Plaintiffs in federal court sought damages on the grounds of negligence on the part of Mrs. Hall in colliding with them on or about July 7, 1965, at the intersection of Highways 29 and 349 when they themselves were "proceeding in a careful and prudent manner." Thus, the issue in the federal case is the respective negligence of Mrs. Hall and Mrs. Bleisch as causing the July 7 accident. Likewise, the issue in the cross-action of the Bleisches against the Halls in the State Court proceeding, seeking contribution or indemnity, was the same issue of the respective negligence of the two drivers, Mrs. Hall and Mrs. Bleisch, as was likewise true of the cross-action of the Halls against the Bleisches. Only the elements of damages were different.

No attention has been given by either of the courts to the express provision in the state court judgment that the Halls go free and clear of all claims and causes of action which have or might have been asserted against them in that suit by Coles or anyone else. That provision has been denied any effect. The state court judgment similarly provided with respect to the Bleisches going free and clear of all claims

that might have been asserted against them, and the Halls therefore could not now sue them for damages growing out of that accident.

In disregarding the express terms of the state court judgment, the federal courts below have failed to give it full faith and credit, and this amounts to a denial of due process. Just as the due process clause of the Fifth Amendment acts as a check upon federal power to extend the effect of res judicata improperly, so it also restrains a federal court from improperly restricting or refusing effect to a state court judgment. See Moore's Federal Practice, 2d E., §0.406[2], as to the interrelation between res judicata and due process.

II.

Having elected to assert a cause of action against Petitioners in the state court proceeding for alleged negligence causing the automobile accident in question, Respondents were not entitled to withhold elements of that cause of action for later independent adjudication in federal court, and the federal judicial system should recognize the conclusive effect of the final state court judgment upon the entire cause of action.

It is well established in Texas, as in most states, that a party may not split a single cause of action and litigate different phases of the same cause of action in different forums. It is likewise established that a party has but a single cause of action for a single wrongful or negligent act or omission, regardless of how many separate items of damage therefrom there may be. Such cause of action

cannot be split or fragmented, and a judgment as to any element of damage may be pleaded in bar of a later action to recover for other elements.

This principle is even applied as to personal injuries and to property damage received in the same accident. *Cormier v. Highway Trucking Co.*, 312 S.W. 2d 406; *Owens v. Peeples*, 391 S.W. 2d 493. It applies even though the first judgment may be an agreed judgment. Thus, in *Garrett v. Matthews*, 343 S.W. 2d 289, there was an agreed judgment in a suit on a personal injury claim and thereafter the same claimant brought an action for property damage from the same accident. Defendant asserted the prior judgment as res judicata, and the Texas courts sustained this position, the Court of Civil Appeals declaring:

> "We feel compelled to follow the authority of the Cormier case so well reasoned by Chief Justice Murray and hold with that court that there is no good reason why the parties should be put through the expense and trouble of two lawsuits when the grounds of recovery of the two items of damage must be based on exactly the same facts."

That reasoning likewise applies here. Out of the accident here involved, the Bleisches had three possible elements of damage from the claimed negligence of Mrs. Hall: (1) for personal injuries to Mr. and Mrs. Bleisch; (2) for property damage to the Bleisch automobile; and (3) for reimbursement of all or part of their possible liability to Coles. They did bring a crossclaim or cross-action against the Halls in the state court proceedings for one of those elements and under Texas law were not permitted to fragment their cause of

action by reserving other elements for future litigation in another court.

The Texas policy in this connection is so strong that it has even been applied not only to the original parties but to their privies, including an insurance company with a subrogation claim. Thus, in *Traders & General Ins. Co. v. Richardson*, 387 S.W. 2d 478, er. ref., a truck insurer brought a subrogation suit to recover back the sum it had paid its insureds for damage to their truck from a collision with another vehicle, suing the driver of the other vehicle and her husband. It was held that the insurer was barred because in a previous action the truck driver and his brother, the other owner, had brought a suit for personal injuries which was concluded by an agreed judgment that they take nothing against the other driver and her husband. The Court stated:

> "There was one cause of action arising out of the collision between Jack Haflin and Martha Richardson. This was a cause of action for damages which included property damages to the truck and personal injury damages to Jack Haflin. Both elements of damages could be recovered in the suit by Jack Haflin and George Haflin against Martha Richardson. Even though there may be doubt as to whether or not the pleadings in the original suit were specific enough to include property damage to the truck, there is no doubt but that this was a proper element of damages which could be recovered under the one cause of action. The payment of money by Traders & General Insurance Company to Jack and George Haflin and the execution of the subrogation papers by Jack and George Haflin to Traders & General Insurance Company did not effectively split the cause of action. The splitting of the

> cause of action for damages under the circumstances in this case is not permitted under the law of this state. *Garrett v. Matthews* (Tex. Civ. App. 1961) 343 S.W. 2d 289; *Cormier v. Highway Trucking Co.* (Tex. Civ. App. 1958) 312 S.W. 2d 406. Traders & General Insurance Company could have protected itself by filing an intervention while the first suit was pending. The judgment in the first suit is a bar to any recovery in this present suit."

Rule 97(a), Texas Rules of Civil Procedure, providing for compulsory counterclaims applies to any claim "the pleader has against any opposing party" arising out of the same subject matter as the opposing party's claim. The Court of Appeals states that any claim by the Bleisches against the Halls in the state court litigation for the damages sought in federal court would have been a crossclaim rather than a counterclaim apparently on the ground that they were co-parties rather than opposing parties.

When the state court suit was originally filed by Coles, it is true that the Bleisches and the Halls were co-parties, but when the Halls filed a cross-action or crossclaim against the Bleisches, and the Bleisches did likewise against the Halls, then they did become opposing parties so that the compulsory counterclaim rule became operative as between them. They were no longer merely co-defendants as to the Coles action, and with the filing of the Hall's action against them the Bleisches stood in the status of defendants and the Halls as plaintiffs as to that action. They were now adverse parties, each asserting that the accident in question was solely the fault of the other and seeking affirmative relief from the other.

The courts below have overlooked the fact that the Bleisches were not merely co-defendants with the Halls as to the Coles action, but were cross-defendants as to the action brought against them by the Halls as cross-plaintiffs, and with respect to this action by the Halls, they were opposing parties and any claim against the Halls arising out of the same accident was a compulsory counterclaim with reference to the action or crossclaim of the Halls against them.

A Texas case specifically dealing with this exact point is *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W. 2d 367, er. ref. n.r.e. There a bank brought action against the makers and accommodation makers of a note, and the accommodation makers filed a cross-action against the makers for judgment over against them. It was declared that while the makers and accommodation makers were originally co-defendants, the filing of a cross-action by the accommodation makers against the makers brought the compulsory counterclaim rule into play so that any counterclaim which the makers may have had against the accommodation makers for damages for alleged fraudulent representations in connection with the transaction was a compulsory counterclaim, and therefore judgment in that action was res judicata in a subsequent action by the makers against the accommodation makers for damages for the alleged fraudulent representations. It will be noted that the cross-action by the accommodation makers which made the counterclaim of the makers compulsory was for indemnity.

With reference to the contention in the second suit that the action of the makers was barred on principles of res judicata as a compulsory counterclaim that should have been asserted as a defense to the cross-action of the accommodation makers in the litigation by the bank, the court had this to say:

> "The question of law thus posed is an interesting one and it is also our view that this further contention of appellees is well taken. Rule 97(a) provides: Compulsory Counterclaims. A pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, *which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.* (Emphasis ours.) Our rules of procedure are to be liberally construed, Rule 1, to the end that litigation may be conducted impartially and expeditiously resolved. *Stone v. Texas Emp. Ins. Ass'n*, 154 Tex. 21, 273 S.W. 2d 59.
>
> "In the verified motion of appellees they say that in the 1952 Bank suit plaintiffs appeared and advised the court that they had no defense to the cross-action of defendants Collis P. Irby and Carson Manor Hotel, Inc.; whereas in the present suit plaintiffs claim heavy damages by reason of defendant Irby's refusal to aid in renewal of the $50,000 note, which wrongful act, additional to the fraud alleged, caused them to default in installment payments. To the extent that the present suit has validity, it would have constituted an offset to the cross-action of appellees in the Bank litigation, and hence logically a compulsory counterclaim as arising out of the transaction or occurrence that is the subject matter of the opposing party's (appellees') claim. Of course the trial court under Rule

> 174 would be authorized to later order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues *in furtherance of convenience or to avoid prejudice.* (Emphasis ours.)"

While this might be considered dictum since the action was also held barred by limitations, it is the clearest discussion of the precise question in any Texas case and very clearly and expressly asserts the view of the Texas court that the res judicata contention was well taken. There are no Texas cases to the contrary, and indeed none elsewhere in either state or federal courts, except the holding of the Court of Appeals here.

If Rule 97(a) were intended only to apply to claims of a defendant against the original plaintiff, it would have referred to claims a "defendant" has against a "plaintiff." However, it is very pointedly worded instead in terms of any claim a "pleader" has against "any opposing party," so that it is clearly intended to have a wider application.

The effect of the failure to assert the compulsory counterclaim in one action is to preclude the party from later bringing an independent action upon it. *Beach v. Runnels*, 379 S.W. 2d 684, er. ref.; *Stringer v. Munnell*, 390 S.W. 2d 484, er ref.; *Gautreaux v. City of Port Arthur*, 408 S.W. 2d 531; *Chem-Gas Engineers, Inc. v. Texas Asphalt & Refining Co.*, 398 S.W. 2d 143. The result is the same in federal court. *U. S. v. Eastport SS Corp.*, 255 F. 2d 795; *Schott v. Colonial Baking Co.*, 111 F.S. 13. The Schott opinion points out that a federal court should follow the state law with respect to

res judicata in a diversity case, and directly does so as to a compulsory counterclaim situation.

However, the real point is not the compulsory counterclaim rule as such, nor the distinction between crossclaim and counterclaim, but rather the fact that the Bleisches and the Halls did choose to assert causes of action against each other in the state court action. We say that when the Halls asserted their action against the Bleisches, the compulsory counterclaim rule then came into play to require the Bleisches to assert any claim they had arising out of the same accident (as pointed out by *Lacy v. Carson Manor Hotel, Inc., supra*), but even more importantly that when the Bleisches did file their claim against the Halls in the state court action, whether they were required to file any claim or not, they then were required to include their entire cause of action growing out of the same accident and could not restrict themselves to part of it. Having elected to assert a claim against the Halls, whether it be considered a counterclaim or a crossclaim, they were required to include in it all elements of their cause of action and not just part of them or else be barred from future assertion of any omitted elements of damage from the same accident.

This is required by the basic public policy behind the doctrine of res judicata, the compulsory counterclaim rule, and the rule against splitting causes of action.

Even if we assume that the Bleisches could have elected merely to defend against Coles in the state court action without asserting any claim against the Halls, they did not

do so. They elected to take a position adverse to the Halls and to bring a claim against them arising out of this accident. Under the law, they are not allowed to fragment that claim and bring different parts of it in different proceedings.

The Bleisches had a single cause of action against the Halls for all kinds of damage claimed to arise from Mrs. Hall's alleged negligence in causing the automobile accident. Having asserted that cause of action as to some claimed elements of damage in state court and having allowed a valid final judgment to dispose of that part of their cause of action, they are not entitled to pursue other fragments of the same cause of action in an independent federal court proceeding.

III

The role of Respondents' insurance carrier in the state court case should not deprive Petitioners of the effects of a valid and final state court judgment.

As shown by the affidavits filed by Respondents in opposition to the Motion to Dismiss, they took the position below that they should not be bound by the prior state court judgment because it was handled by attorneys employed by their insurance carrier, without their knowing of or consenting to the exact wording of the judgment.

Of course, both Mr. and Mrs. Bleisch did have personal notice of the state court action and were personally served therein and actually had independent personal counsel in addition to the attorneys employed by their insurer and are

charged with knowledge of the law, including that relative to res judicata, compulsory counterclaims, and the splitting of causes of action. If they have been mistreated or wronged by their insurer, then perhaps they have a cause of action against it, but under the law of Texas it is clear that the role of an insurer in such a situation does not prevent the application of res judicata.

The leading Texas case in this connection is *Beach v. Runnels*, 379 S.W. 2d 684, er. ref. The Beach and Runnels automobiles collided, with property damage and personal injuries to both parties. Runnels sued Beach, and Beach's insurance carrier employed attorneys to answer and defend him. The suit was settled by the attorneys employed by the insurer "without the consent of Beach and his personal attorney," and an order of dismissal entered. Thereafter Beach sued Runnels for personal injuries and property damage. Runnels filed a motion for summary judgment on the ground that Beach's claim was in the nature of a compulsory counterclaim barred by dismissal of the prior suit. Beach answered with the contention that his insurer was responsible for the settlement and that he should not be barred by its action. This contention was rejected and it was held that the motion for summary judgment was properly sustained and that no exception would be engrafted upon Rule 97(a) or the principles of res judicata because of the handling of the original case by an insurance carrier. Cases from other jurisdictions to the same effect were cited, including *Keller v. Keklikian*, 244 S.W. 2d 1001 (Mo.), and *Pesce v. Linaido*, 123 So. 2d 747 (Fla.).

The same question was presented in *Stringer v. Munnell*, 390 S.W. 2d 484, er. ref., and *Harris v. Jones*, 404 S.W. 2d 349 (1966), which reaffirmed the result of *Beach v. Runnels*. The principal of unity of the cause of action is also applied to bar an insurance company, as seen in *Traders & General Ins. Co. v. Richardson*, 387 S.W. 2d 478, er. ref., discussed *supra*.

While Respondents may have a meritorious claim against their insurance carrier, their remedy is against that carrier rather than recovery here against Petitioners in disregard of the legal effect of the state court judgment.

CONCLUSION

This case goes to the root of the relation between the state and federal judiciaries and is concerned with the duty of the federal courts to give full faith and credit to a valid final state court judgment. The failure of the federal courts to give the proper lawful effect to such a judgment is a federal denial of due process under the Fifth Amendment. Thus, the subject matter is one calling for the exercise by this Court of its power of supervision to insure the proper treatment of state court judgments in the federal courts.

The specific question is one of first impression here, but the judgment of the Court of Appeals is contrary to the reasoning and policy of a vast body of state and federal law. It would create a bad and dangerous precedent. The kind of situation here involved is not uncommon and will become increasingly frequent in the future, as our crowded

highways give rise to more and more multiple car collisions. Moreover, the principle of allowance by federal courts of the proper res judicata effect to a state court judgment is by no means restricted to motor vehicle accidents and is of much wider applicability.

The decision of the Court of Appeals as to the Texas law is directly contrary to the Texas law as revealed by *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W. 2d 367, er. ref. n.r.e., on a matter as to which the state law is controlling.

It is therefore urged that this Petition should be granted.

Respectfully submitted,

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Midland, Texas,

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Dallas, Texas 75201,
Attorneys for Petitioners.

By Royal H. Brin, Jr.

APPEARANCE AND CERTIFICATE OF SERVICE

I, ROYAL H. BRIN, JR., hereby request the Clerk to enter my appearance as counsel for Petitioners Hal Hall and Snow Blackburn Hall, and as one of the attorneys for said Petitioners and a member of the Bar of the Supreme Court of the United States, I hereby CERTIFY that on the 16th day of December, A.D. 1968, I served a true and correct copy of the foregoing Petition for Certiorari by depositing the same in the United States Post Office with first class postage prepaid addressed to Johnny Splawn, Splawn & Maner, P. O. Box 1437, Lubbock, Texas, attorney of record for Respondents.

Royal H. Brin, Jr.

Royal H. Brin, Jr.

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25647

HAL HALL and SNOW BLACKBURN HALL,
Appellants,

v.

PAUL J. BLEISCH, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Texas

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(September 30, 1968)

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

PER CURIAM: The parties to this appeal were involved in a three car acident. The owner of the third car sued them in state court to recover property damages. They crossclaimed, one as against the other, for indemnity as to the third party's property damage. The case was settled by a consent judgment in the state court. Appellees then brought suit in the federal court against the Halls, seeking damages for personal injuries.

The district court did not err in rejecting the defense based on res judicata. The issue presented in the federal suit was not in issue in the state court litigation which appellant asserts as having given rise to the bar, nor is it such an issue as would require the application of res judicata under Texas law. The case of *Ogletree v. Crates*, 363 S.W. 2d 431 (Tex. S. Ct. 1963), relied on by the appellants, extends only to requiring the assertion of all defenses that a defendant might have against a plaintiff. We do not read it to require the assertion of possible cross-claims by co-defendants.

There is likewise no merit in the contention that the suit is barred by the failure of appellees to comply with the Texas compulsory counterclaim rule in the state court litigation. The claims asserted were crossclaims and not counterclaims. Rule 97, Texas Rules of Civil Procedure; Rule 13, Federal Rules of Civil Procedure; and Wright, Federal Courts, p. 306 (1963).

AFFIRMED.

APPENDIX B

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1968

No. 25647

D. C. Docket No. CA 67-17-P

HAL HALL and SNOW BLACKBURN HALL,
Appellants,

v.

PAUL J. BLEISCH, et al.,
Appellees.

Appeal from the United States District Court for the Western District of Texas

Before BELL and SIMPSON, Circuit Judges and ROBERTS, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Hal Hall and Snow Blackburn Hall, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 30, 1968 Issued as Mandate: Oct. 22, 1968